75-1914

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. .....

JANE MONELL, et al.,

Petitioners,

—v.—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Authorities	1
Opinions Below	6
Jurisdiction	7
Questions Presented	7
Statutory Provisions Involved ...	8
Statement of the Case	11
Reasons for Granting the Writ ...	14
I. In Holding That The Equal Employment Opportunity Act of 1972 Had No Application to A Case Pending At the Time of Its Enactment the Decision Below Conflicts With A Subsequent Decision of This Court ...	14
II. In Holding That the Defendants Were Not "Persons" for the Purposes of a Back Pay Award Under 42 U.S.C. §1983 the Decision Below Conflicts With Decisions of Other Courts of Appeals	23
Conclusion	33

TABLE OF AUTHORITIES

Cases:	Page
Adkins v. Duval County School Board, 511 F. 2d 690, 693-696 (5th Cir. 1975)	27
Albermarle Paper Co. v. Moody, __ U.S. ___, 95 S. Ct. 2362 (1975)	30
Aurora Education Assoc. East v. Bd. of Ed. of Aurora Pub. Schl. Distr. No. 131, 490 F. 2d 431 (7th Cir. 1973), cert. denied 416 U.S. 985 (1974)	26
Brown v. General Services Administration, 425 U.S. ____, 44 U.S.L.W. 4704 (1976), affirming 507 F. 2d 1300 (2d Cir. 1974)	15-20
Burt v. Board of Trustees of Edgefield County School District, 521 F. 2d 1201 (4th Cir. 1975)	28
City of Kenosha v. Bruno, 412 U.S. 507 (1973)	24
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) ...	24,25 29-30
Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (E.D. Va., 1971)	25

Page

Goss v. Lopez, ___ U.S. ___, 95 S. Ct. 729 (1975) 31

Guy v. Robbins and Myers, Inc., 525 F. 2d 124 (6th Cir. 1975), cert. granted, ___ U.S. ___, 44 U.S.L.W. 3608, No. 75-1276, (1976) 21

Hostrop v. Bd. of Jr. College Distr. No. 515, 523 F. 2d 569 (7th Cir. 1975), cert. denied ___ U.S. ___, 44 U.S.L.W. 3624 (1976) 27

Incarcerated Men of Allen County v. Fair, 507 F. 2d 281 (6th Cir. 1974) 28-29

Intern'l Union Etc. Local 790 v. Robbins and Myers, Inc., 525 F. 2d 124 (6th Cir. 1975) cert. granted ___ U.S. ___, 44 U.S.L.W. 3608, No. 75-1264, (1976) 21

James v. Board of Education, 461 F. 2d 566 (1972) cert. denied, 409 U.S. 1042 (1972) 31

Keckeisen v. Independent School District 612, 509 F. 2d 1062 (8th Cir. 1975), cert. denied, ___ U.S. ___, 44 U.S.L.W. 3202 (1975) 27

Page

Liberty Mutual Insurance Company v. Wetzel ____ U.S. ____, 44 U.S.L.W. 4350 (1976) 16

Monroe v. Pape, 365 U.S. 167 (1961) 23-24

Mt. Healthy City School District Bd. of Ed. v. Doyle, 529 F. 2d 524 (6th Cir. 1975) cert. granted, ____ U.S. ____, 44 U.S.L.W. 3585, No. 75-1278, (1976) 26,32

Muzquiz v. City of San Antonio, 528 F. 2d 499 (5th Cir. 1976) (en banc) 29

Place v. Weinberger, 497 F. 2d 412 (6th Cir. 1974), cert. granted, judgment vacated and remanded ____ U.S. ____, 44 U.S.L.W. 3718 (1976) 17,20

Singleton v. Vance County Board of Education, 501 F. 2d 429 (4th Cir. 1974) 27

Sugarman v. Dougall, 413 U.S. 643 (1974) 31

Thomas v. Ward, 529 F. 2d 916, 920-921 (4th Cir. 1975) 28

Page

Other Authorities:

Fourteenth Amendment, U.S. Constitution 31

Civil Rights Act of 1871, 42 U.S.C. § 1983 ..... 8,12 23-26,28,30

Civil Rights Act of 1964, 42 U.S.C. 2000 e 7,9 12,14

Equal Employment Opportunity Act, 42 U.S.C. 2000 e(a).. 7,9,12 14,17,19-20

1972 Code Congressional & Admin. News 20

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA, and CAROL ABBEY, on their own behalf and in behalf of all others similarly situated, Petitioners

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, HENRY SMITH, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, as Chancellor of the City School District of the City of New York, and ABE BEAME, as Mayor of the City of New York, Respondents,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Jane Monell, et al, pray that a writ of certiorari be issued to review the final judgment of the United States Court of

Appeals for the Second Circuit entered in the office of the clerk on March 8, 1976.

OPINIONS BELOW

The opinion of the District Court certifying this as a class action is reported at 357 F. Supp. 1051 (S.D.N.Y. 1972) and is reproduced as Appendix I, infra at A1-A14. The opinion of the District Court dismissing this action is reported at 394 F. Supp. 853 (S.D.N.Y. 1975) and is reproduced as Appendix II, infra at A15 - A27. The opinion of the United States Court of Appeals for the Second Circuit, reported at 532 F. 2d 259 (2d Cir. 1976) is reproduced as Appendix III, infra at A28 - A70.

JURISDICTION

The Second Circuit rendered its judgment affirming the order of the District Judge dismissing this action on March 8, 1976 and entered its order on the same date. An extension of time within which to file this petition to July 9, 1976 was granted by Mr. Justice Marshall on May 25, 1976. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Act of 1972 extending the coverage of Title VII of the Civil Rights Act of 1964 to state and local officials and educational institutions should be applied in an action which had been brought prior to the effective date of the 1972 Act

and which was still pending on that date?

2. Whether local governmental officials and/or local independent school boards are "persons" within the meaning of 42 U.S.C. §1983 when equitable relief in the nature of back pay is sought against them in their official capacities?

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871 §1; 42 U.S.C. §1983 (1970).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Equal Employment Opportunity Act of 1972, §2(1), §3; 42 U.S.C. §2000 e (a), §2000 e - 1.

Sec. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

Sec. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e-1) is amended to read as follows:

EXEMPTION

"Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

STATEMENT OF THE CASE

The plaintiffs in this action are women who were compelled by the defendants to take leaves of absence from their employment during their pregnancies. Defendants are the Mayor of the City of New York and its Commissioner of Social Services as well as the Board of Education of the City of New York and its Chancellor. The mandatory suspensions were invoked against all of the plaintiffs at varying times during 1971, A7-8, A41,* pursuant to separate but similar policies then pursued by the City of New York and the Board of Education. None of the plaintiffs have ever been

* References are to the Appendix in the Second Circuit unless otherwise indicated.

compensated for pay lost during their involuntary suspensions. In their original complaint, filed July 26, 1971, plaintiffs challenged, on constitutional grounds, the relevant regulations of each of the defendants. Jurisdiction was initially based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3), A1.

An amended complaint was filed on September 14, 1972, following the amendment to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.)by the Equal Employment Opportunity Act of 1972 which extended the Civil Rights Act's coverage to state and local governments and boards of education, 14A. The plaintiffs then added Title VII both as a ground

for relief and as a source of jurisdiction.

In an opinion filed April 12, 1972, the District Court denied both defendants' motion to dismiss and plaintiffs' motion for summary judgment, but granted plaintiffs' motion to declare this a class action. The defendants subsequently abandoned their mandatory pregnancy rules. Plaintiffs' claims for equitable restitution, however, remained outstanding.

In the opinion and order dated April 30, 1974, Judge Metzner dismissed the complaint for lack of subject matter jurisdiction, Appendix II, infra. The Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I

In Holding That The Equal Employment Opportunity Act of 1972 Had No Application to A Case Pending At the Time of Its Enactment The Decision Below Conflicts With A Subsequent Decision of This Court.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000 e et seq was amended as of March 24, 1972 to include within its coverage "governments, governmental agencies [and] political subdivisions" as well as educational institutions, Pub. L. No. 92-261 § § 2(1), 3, "The Equal Employment Opportunity Act" (amending 42 U.S.C. § 2000 e (a)). In the instant case the Second Circuit held

that although the 1972 amendments brought local officials within the ambit of Title VII these amendments could not be applied to authorize relief on behalf of the plaintiffs, whose injuries occurred during 1971 but whose case was pending at the time of the amendments. This holding contravenes that of this Court in Brown v. General Services Administration, 425 U.S.___, 44 U.S.L.W. 4704 (1976), affirming 507 F. 2d 1300 (2d Cir. 1974).[1] There too the plaintiff was aggrieved in 1971 - prior to the effective date of the

1. The Second Circuit had also applied the 1972 amendments, retroactively in Brown v. G.S.A., supra. As will be shown, however, the purported distinction which allowed the Second Circuit to reach a different result in this case was erroneous under the Supreme Court's approach in Brown.

1972 amendments - but this Court found the amendments to be applicable, Brown v. General Services Administration, supra, 44 U.S.L.W. at 4705 n.4. The failure of the defendants in Brown to raise the question before this Court is not significant since the issue went to subject matter jurisdiction and this Court would, if such were lacking, have raised the point sua sponte and dismissed the action, compare Liberty Mutual Insurance Company v. Wetzel ____U.S.____, 44. U.S.L.W. 4350 (1976) (judgment of the Court of Appeals for the Third Circuit in a Title VII case dismissed sua sponte for want of appellate jurisdiction in the Court of Appeals).

Also indicative of the significance of the ruling in Brown, supra,

is this Court's disposition of Place v. Weinberger, 497 F. 2d 412 (6th Cir. 1974), cert. granted, judgment vacated and remanded ____U.S.____, 44 U.S.L.W. 3718 (1976), in which the Supreme Court remanded "for further consideration in light of Brown v. Government Services Administration, (sic) 425 U.S. ____, slip op. 3 n.4 (1976)." The sole question before the Court in Place v. Weinberger, supra, was the same question here at issue, i.e., whether the Equal Employment Opportunity Act of 1972 should be applied to a case pending as of its enactment, see summary of petition for certiorari, Place v. Weinberger, 74 - 116, 43 U.S.L.W. 3152 (1974).

Thus the vacatur and remand in Place not only demonstrates the sig-

nificance of footnote four in Brown, it also points the way to appropriate disposition of this petition: to grant the petition outright or to grant it, vacate the holding of the Second Circuit, and remand for reconsideration.

The Second Circuit was of the view that this case was distinguishable from Brown v. General Services Administration, supra, because the defendant there was an agency of the federal government whereas these defendants are municipal agents and an educational institution (App. III, A40). The Court thought that difference was important because it found - in a key error - that victims of federal discrimination enjoyed a right to back pay prior to 1972,

while victims of local discrimination did not, App. III, A40 - 42.

This Court's opinion in Brown v. General Services Administration, supra, shows that the Second Circuit was wrong. In Brown this Court held flatly:

> Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect federal employees. - Id at 425 U.S.____, 44 U.S.L.W. 4705.

Were this not clear enough the Second Circuit's error could also be demonstrated by reference to Congress' understanding of the status of federal employees prior to the 1972 amendments.[2] Since, then, the Equal

2. "Despite the series of executive and administrative directives on equal employment opportunity, Federal employees ... face legal obstacles in obtaining meaningful remedies ... Monetary restitution or

Employment Opportunity Act created new rights for state, local, and federal workers, the distinction the Second Circuit made below was improper. That decision is therefore as much in conflict with Brown v. General Services Administration, supra, as was the Third Circuit's decision in Place v. Weinberger, supra. It should be remanded for reconsideration in the light of Brown, supra and of the law governing back pay for federal officials prior to 1972.

Additional reason for granting the writ concerns the importance of the legal questions at stake: Are

2. back pay is not attainable." H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. (1971), 1972 U.S. Code Cong. & Admin. News 2137, 2160.

state and local employees entitled to less protection under Title VII, as amended, than federal employees, even when the statute in terms makes no distinction between them? More basically still, in what circumstances may a statute furthering basic civil rights be denied application to a pending case? This Court recognized the importance of such questions when it granted the writs in Intern'l Union Etc. Local 790 v. Robbins and Myers, Inc., No. 75-1264, cert. granted ____ U.S. ___, 44 U.S.L.W. 3608 (April 23, 1976) and Guy v. Robbins and Myers, Inc., No. 75-1276, cert. granted ____ U.S. ____, 44 U.S.L.W. 3608 (April 23, 1976), both of which concerned the retroactive effect of another aspect of the 1972 amendments,

i.e., the increase of the time for filing charges from 90 to 180 days. For similar reasons the writ here sought should also be granted. Alternatively, the decision below should be vacated and remanded for reconsideration.

II

In Holding That The Defendants Were Not "Persons" for the Purposes of a Back Pay Award Under 42 U.S.C. §1983 the Decision Below Conflicted With Decisions of Other Courts of Appeals.

On its face, 42 U.S.C. §1983 authorizes a decree in equity ordering defendants Abe Beame and Henry Smith to provide, in their official capacities, back pay to the plaintiffs here, for those defendants are clearly "persons", whether sued individually or in their official capacities.[3] In reading the statute against its plain language the Second Circuit relied, in essence, on Monroe

3. Defendants are not alleged to be liable in their individual capacities.

v. Pape, 365 U.S. 167 (1961) and City of Kenosha v. Bruno, 412 U.S. 507 (1973), which together establish that municipalities are not "persons" for the purpose of §1983. Neither of these cases proscribed suits against municipal officials, or against a local independent school board, however.

Moreover, in subsequent cases the Supreme Court has continued to treat §1983 as authorizing monetary relief against governmental officials sued in their official capacities.

Precisely on point is Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), in which the Court referred to the back pay award as "appropriate," 414 U.S. at 638.

The Court was there referring to the order in Cohen v. Chesterfield County School Board, 326 F. Supp. 1159, 1161 (E.D. Va., 1971). This was a companion to Cleveland Board of Education v. La Fleur, supra, in which defendants were the Chesterfield County School Board and its Superintendent. The result can be interpreted to mean that §1983 relief ordering back pay is authorized against local officials or against autonomous bodies of local government other than municipalities, or both. In the view of the Second Circuit, however, it meant neither, AIII, A42 - A70 .

This decision conflicts with that made in other circuits both as to the

amenability to suit of officials sued in that capacity and as to the amenability of school boards to §1983 suits.

This Court has already consented to review one of the cases presenting the latter issue, Mt. Healthy City School District Bd. of Ed. v. Doyle, 529 F. 2d 524 (6th Cir. 1975) cert. granted,_____U.S._____, 44 U.S.L.W. 3585 (1976) (No. 75-1278). There the Sixth Circuit apparently[4] held the defendant school board subject to liability under 42 U.S.C. §1983. The same result was reached in the Seventh and Eighth Circuits, see Aurora Education Assoc. East v. Bd. of Ed. of Aurora Pub. Schl. Distr.

4. The Sixth Circuit did not issue an opinion and the decision of the District Court is unreported.

No. 131, 490 F. 2d 431, 435 (7th Cir. 1973), cert. denied 416 U.S. 985 (1974), compare Hostrop v. Bd. of Jr. College Distr. No. 515 523 F. 2d 569, 576-577 (7th Cir. 1975), cert. denied ____U.S._____, 44 U.S.L.W. 3624 (1976) (defendant not a "person"). See also Keckeisen v. Independent School District 612, 509 F. 2d 1062, 1065 (8th Cir. 1975), cert. denied ____ U.S._____, 44 U.S.L.W. 3202 (1975).

Contrary results have been reached not only in the Second Circuit but in the Fourth and Fifth Circuits as well, Adkins v. Duval County School Board, 511 F. 2d 690, 693-696 (5th Cir. 1975); Singleton v. Vance County Board of Education, 501 F. 2d 429 (4th Cir. 1974).

A conflict also exists in the issue of whether local officials are liable to §1983 suits for monetary relief in their official capacities. In Burt v. Board of Trustees of Edgefield County School District, 521 F. 2d 1201, 1205 (4th Cir. 1975), the Fourth Circuit held that while the defendant school board was not a person for the purposes of §1983, the board members were such even for the purposes of a back pay award against them in their official capacities. This decision was adhered to in Thomas v. Ward, 529 F. 2d 916, 920-921 (4th Cir. 1975).

The Sixth Circuit has also taken a position in conflict with that adopted below, Incarcerated Men of

Allen County v. Fair, 507 F. 2d 281, 287-288 (6th Cir. 1974) (award of counsel fees against a sheriff sued in his official capacity.)

The Fifth Circuit, on the other hand, is in accord with the Second, see Muzquiz v. City of San Antonio, 528 F. 2d 499, 500 (5th Cir. 1976) (en banc), but see separate dissenting opinions of Judges Tuttle, Thornberry, and Godbold, Id. at 528 F. 2d 501-505.

The result in the present case illustrates the importance of the issues raised in this petition. Though petitioners were deprived of constitutional rights which this Court has included among "the basic civil rights of man," Cleveland Board of Education v. La Fleur,

414 U.S. 632, 640 (1974) the judiciary is, according to the Second Circuit, powerless to order those who violated their rights to recompense them. Though this is unfortunate for them as individuals, far more important is the impact of the holding on the status of constitutional rights in general, for, if plaintiffs right to compensation is eliminated so too will be defendants incentive to adhere to the Constitution and laws, see Albermarle Paper Co. v. Moody, ____ U.S. ____, 95 S. Ct. 2362, 2371 (1975).

As 42 U.S.C. §1983 offers protection against "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ..." (emphasis added) it is the

source of federal judicial protection against official acts violating rights to due process of law, Goss v. Lopez, ____ U.S. ____, 95 S. Ct. 729 (1975); to freedom of speech, James v. Board of Education, 461 F. 2d 566 (1972) cert. denied, 409 U.S. 1042 (1972); and to the equal protection of law, Sugarman v. Dougall, 413 U.S. 643 (1974). To forbid the federal judiciary to make whole the victims of illegal official conduct is therefore to attack a broad range of constitutional rights.

If this Court decides not to vacate and remand this case (or grant the writ) as suggested in Point I, supra, it is respectfully urged that the writ should be granted for the reasons urged in this point. Alter-

natively, the Court could defer consideration of the petition pending its decision in Mt.Healthy City School District Bd. v. Doyle, supra.

CONCLUSION

For all of the foregoing reasons this petition for writ of certiorari should be granted and the judgment in this case should be vacated and remanded for further proceedings.

Respectfully submitted,

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APPENDIX I

Jane MONELL et al., Plaintiffs,

v.

DEPARTMENT OF SOCIAL SERVICES OF the CITY OF NEW YORK et al., Defendants.

No. 71 Civ. 3324.

United States District Court, S. D. New York.

April 12, 1972.

Nancy Stearns, Center for Constitutional Rights, New York City, Oscar G. Chase, Brooklyn, N. Y., for plaintiffs.

J. Lee Rankin, Corp. Counsel, City of New York, by Victor P. Muskin, Asst. Corp. Counsel, New York City, for defendants.

Memorandum Opinion and Order
on Motion to Dismiss and
for Summary Judgment

MOTLEY, District Judge:

This is an action by female employees of the New York City Board of Education and the New York City Department of Social Services on behalf of themselves and other female employees in city agencies similarly situated. Plaintiffs challenge, on federal constitutional grounds, rules and regulations of the defendant city agencies which plaintiffs claim arbitrarily compel pregnant women employees to take unpaid leaves of absence when they desire to and are capable of continuing to work beyond the mandatory leave period.

The complaint alleges that in the case of pregnant female employees agency policy permits such employees to work

through the seventh month of pregnancy with the approval of the agency physician. However, under city-wide leave regulations pregnant female employees are permitted to work only until the completion of the fifth month of pregnancy, unless they receive agency medical approval and approval of the head of the agency involved (Complaint, para. 22, 26.) The only exception to the aforesaid policy obtains when the eighth month of pregnancy occurs during the last month of the school term (Complaint, para 28.) This, of course, applies only to women in the school system.

The primary constitutional claim is that the policy making unpaid leave mandatory at the end of the seventh month of pregnancy is arbitrary and

without medical foundation and therefore violates plaintiffs' rights to liberty and property and equal protection guaranteed them by the Fourteenth Amendment to the Constitution.

Defendants have moved to dismiss this action on the ground that 1) the court lacks jurisdiction of the subject matter; or 2) the complaint fails to state a complaint on which relief can be granted. The motion is denied.

Jurisdiction in this court is predicated solely on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the civil rights statutes.

(1) In moving to dismiss the action on jurisdictional grounds defendants relied upon the decision of the Second Circuit in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) and its progeny.

Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971); Canty v. Board of Education, 448 F.2d 428 (2d Cir. 1971). Defendants' claim is that the gravamen of the complaint--that plaintiffs have been deprived of the income they would have earned had they not been required to take maternity leave--is nothing more than a claim of injury to personal liberty which is dependent for its existence upon the infringement of a property right and, therefore, not a claim cognizable under the civil rights jurisdiction of this court. 28 U.S.C. § 1343(3).

In Eisen v. Eastman, the Second Circuit had held that jurisdiction under the Civil Rights Acts, Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 1343(3), could not be predicated on a claim of

infringement of property rights. However, the Supreme Court in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1115, 31 L.Ed.2d 424 (1972) ruled that it "has never adopted the distinction between personal liberties and proprietory rights as a guide to the contours of § 1343(3) jurisdiction" and expressly rejected the distinction. The complaint, therefore, cannot be dismissed for lack of subject matter jurisdiction.

(2) Plaintiffs' equal protection claim is that the requirement that a woman employee take a leave of absence at an arbitrary period during her pregnancy discriminates against women generally, and pregnant women in particular, in violation of rights guaranteed by the Fourteenth Amendment, by placing

an unconstitutional limitation on their employment.

It is true, as plaintiffs claim, that equal rights for women is an idea whose time has come. As a result, the courts have begun to re-examine all sex based restrictions and to apply with increasing sensitivity the guarantee of equal protection of the laws to prohibit arbitrary sex discrimination. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (discrimination against unwed fathers with respect to custody of their children); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) discrimination against women in appointment to administration of estates); White v. Crook, 251 F.Supp. 401 (M.D. Ala.1966) (jury discrimination against women); United States ex rel.

Robinson v. York, 281 F.Supp. 8 (D.Conn. 1968) (unequal sentences for men and women); Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp 184 (E.D.Va.1970) (exclusion of women from state institution of higher education); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971) (exclusion of women from employment as bartenders); Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (N.D.Miss.1969) (exclusion of mothers of illegitimate children from public schools).

(3) Discrimination against women in employment generally is now prohibited by national law. 42 U.S.C. § 2000e. Discrimination against pregnant women employees and in the application of disability benefits to pregnancies has

recently been prohibited by the Rules and Regulations of the Equal Employment Opportunity Commission. 37 Fed.Reg. 6837. An equal rights amendment to the Federal Constitution is making its way through the ratification process of the states. Sex legislation is thus automatically suspect. Reed v. Reed, supra.

Very recently two federal district courts relied upon the guarantee of equal protection to invalidate state maternity leave policies similar to those in the instant case. Cohen v. Chesterfield County School Board, 326 F.Supp. 1159 (E.D.Va.1971); Schattman v. Texas Employment Commission, 330 F.Supp. 328,331 (W.D.Texas 1971). The favorable decision in the Schattman case, however, was reversed by the Court of Appeals for the Fifth Circuit,

459 F.2d 32 (5th Cir. 1972) (Judge John Minor Wisdom, dissenting). The majority held that the compulsory maternity leave after the seventh month involved there was shown to be reasonable and rationally related to a permissible state purpose.

In Cohen v. Chesterfield County School Board, supra, women were required to take a leave of absence after the fifth month of pregnancy. There the court ruled: "The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment." (326 F.Supp. at 1161.)

The instant complaint, therefore, cannot be dismissed for failure to state a claim upon which relief may be granted.

(4) On the other hand, plaintiffs' motion for summary judgment cannot be granted. The central issue of fact is disputed. Plaintiffs claim that women are compelled in every case to leave in the seventh month of pregnancy, except when the eighth month of pregnancy occurs during the last month of the school term. On page 16 of defendants' brief on their motion they assert: "A teacher may continue working, however, until such time as her pregnancy condition interferes with the effective performance

of her duties. There is no arbitrary seven month rule." Defendants state in a letter dated March 28, 1972, addressed to the court, that their policy is that an "individualized medical judgment is made in each case accommodating the teacher's desires with its medical examiner's professional judgment as to her ability to deliver satisfactory performance with reasonable safety to herself."

In the Cohen case the court ruled that "since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor." (326 F.Supp. At 1160.) Whether the defendants would accept the medical judgment of the pregnant teacher's doctor and a waiver of any claim of liability against defendants, such as was

offered by one of the plaintiffs, is not at all clear. Whether defendants require other medically disabled persons to submit to the medical judgment of defendants' doctors as opposed to their own is also not clear.

Therefore, the plaintiffs' motion for summary judgment must be denied.

(5) Plaintiffs have also moved for an order designating the present action a class action. The motion is granted. Plaintiffs represent a class which is so numerous that joinder of all members is impractical. There are numerous women employees in the City of New York's many agencies. There are questions of law and fact common to the class. The claims of the instant plaintiffs are typical of the claims of other members of the class. This court finds that

plaintiffs will fairly and adequately protect the interests of the class. The action is further maintainable as a class action since the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and effective adjudication of the controversy. The court also finds all other criteria for determining whether a class action should be allowed met in this case. Rule 23, Fed.R.Civ.P.

So ordered.

APPENDIX II

UNITED STATES DISTRICT COURT,
S. D. New York.

No. 71 Civ. 3324

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA and CAROL ABBEY, on their own behalf and on behalf of all other similarly situated,
Plaintiffs.

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULES M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York; and John V. Lindsay, as Mayor of the City of New York.
Defendants.

APPEARANCES

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METZNER, D.J.:

This action is brought by female employees of the New York City Board of Education (Board) and the New York City Department of Social Services (Department) on behalf of themselves and other female employees in city agencies similarly situated. Plaintiffs challenge, on constitutional grounds, the rules and regulations of the defendant city agencies which plaintiffs claim arbitrarily compelled pregnant employees to take unpaid leaves of absence when they desired to, and were capable of working beyond the mandatory leave period. Plaintiffs seek declaratory and injunctive relief and damages for back pay.

According to the allegations of the complaint, the individual defendants Sugarman, Scribner and Lindsay are sued

in their official capacities.

Jurisdiction is based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) (the civil rights statute and its jurisdictional counterpart), and 42 U.S.C. §2000(e), et seq. (Title VII, the Equal Employment Opportunity Act).

Judge Motley has previously determined that the suit may be maintained as a class action. 357 F. Supp. 1051 (1972).

Defendants have moved to dismiss the action or, in the alternative, for an order granting summary judgment. They also seek to vacate the order granting class action status to this suit or, in the alternative, to compel plaintiffs to pay for the class action notice if it is ruled that the action proceed as a class action.

Plaintiffs have cross-moved for summary judgment. The original complaint was filed on July 26, 1971 with the plaintiffs being Monell, an employee of the Department, and Terrall and Zapata employed by the Board. An amended complaint was filed on September 14, 1972, which added plaintiff Abbey, who was employed by the Board. The amended complaint was filed following the amendment to Title VII permitting actions against governmental agencies charged with discrimination in employment. The record shows that each of the four plaintiffs was directed to take maternity leave about a month before the date that their respective doctors would have ordered.

In the fall of 1971, the Department changed its maternity leave policy to provide that no woman need report her

pregnancy or take maternity leave as long as she is able to continue to perform her job and desires to do so. This policy change was ordered effective in all city agencies, including the Department, on January 19, 1972, by a directive from former Deputy Mayor Edward K. Hamilton.

The Board of Education of the City of New York similarly changed its bylaws effective September 1, 1973.

These changes, while made subsequent to the institution of this action, antedated the decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which would hold the practices complained of here to be unconstitutional. Consequently, the claims for equitable relief by way of injunction or declaratory judgment are moot. See,

Galvan v. Levine, 480 F.2d 1235 1261 (2d Cir. 1973), cert. denied, 417 U.S. 966 (1974), Nieves v. Oswald, 496 F.2d 808,813 (2d Cir. 1974).

We are left then with claims for back pay covering the periods for which plaintiffs allege they could have worked after being forced to take maternity leave.

The holding in City of Kenosha v. Bruno, 412 U.S. 507 (1973) supports a ruling that an action under Section 1983 will not lie against either the Board or the Department for any relief. Plaintiffs place great reliance on Forman v. Community Services, Inc., 500 F.2d 1246, 1254 (2d Cir.1974), cert. granted, 43 U.S.L.W. 3403 (U.S. Jan. 21, 1975) (No. 647), as authority for the proposition that the Board is not immune to an

action under that section. That case is not in point since the statute creating the State Housing Authority specifically waived governmental immunity both as to the agency and the state.

Under the Eleventh Amendment which precludes any action by a citizen against a state, it has been held that a state officer sued in his governmental capacity may be enjoined from future action that may be violative of the Constitution. Edelman v. Jordan, 415 U.S. 651,664(1974); McMillen v. Board of Education of State of New York, 430 F.2d 1145,1148-49(2d Cir. 1970). However, the Court went on to hold that monetary damages, even if characterized as "equitable restitution," may not be awarded for past injury if they are to be paid from the state treasury. Such

an action runs afoul of the Eleventh Amendment. Edelman, supra, at 664-71. See also, Rothstein v. Wyman, 467 F.2d 226, 236 (2d. Cir. 1971), cert. denied 411 U.S. 921 (1973).

The same reasoning applies to the effort to recover pay in this 1983 action. Monroe v. Pape, 365 U.S. 167 (1961), holds that an action for damages may not lie directly against the municipality. This immunity cannot be circumvented by suing the mayor, the commissioner or the administrator in their official capacities. Any award that would be made would, in the last analysis, be paid by the City of New York. Patton v. Conrad Area School District, 388 F. Supp. 410, 417 (D.Del. 1975); Needleman v. Bohlen, 336 F. Supp. 741 745-46 (D. Mass. 1974); Hines v.

D'Artois, 383 F. Supp. 184, 189-90 (W.D. La. 1974); O'Brien v. Galloway, 362 F. Supp. 901, 905 (D. Del. 1973).

I reach this result fully aware that in Cohen v. Chesterfield County School Board, decided with Cleveland Board of Education v. LaFleur, supra, the district court had granted a judgment for back wages as well as equitable relief. The Court did not indicate the existence of any jurisdictional problems under 1983 either because a board of education was a defendant, as were individuals being sued in tneir official capacities, or because of the nature of the relief sought. This is in contrast to the sensitivity indicated by the Court in Kenosha, supra, where only municipalities were defendants and the Court on its own motion raised the

jurisdictional objection that Section 1983 did not create the right of action for any purpose against such defendants.

We turn now to the claim for relief under Title VII. Prior to March 24, 1972, governmental units were exempt from the operations of Title VII. On that date Public Law 92-261 was enacted which amended Section 2000e(b) so that Title VII relief was available to employees of such governmental units.

As indicated above, this complaint was filed in 1971. In Cleveland Board of Education, supra, at 638-39 n.8. the Court said:

> "At the time that the teachers in these cases were placed on maternity leave, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e et seq., did not apply to state agencies and educational institution. 42 U.S.C. §§2000e(b) and 2000(e)-1. On March 24, 1972, however, the Equal Employment Opportu-

nity Act of 1972 amended Title VII to withdraw those exemptions. Pub. L. 92-261, 26 Stat. 103. Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. 29 CFR §1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future."

This expression of opinion by the Court is dispositive of the issue of retroactivity in this case. The amendment of the complaint by adding plaintiff Abbey does not change the result since the discrimination as to her occurred and was completed prior to the amendment of the statute. Place v. Weinberger, 6 E.P.D. 9010 (E.D.Mich. 1973), aff'd 497 F.2d 412 (6th Cir. 1974), cert. denied, 43 U.S.L.W. 3306 (U.S. Nov. 26, 1974).

The claim for relief pursuant to Title VII is dismissed.

The complaint is dismissed.

So ordered.

Dated: New York, N.Y.
April 30, 1975

CHARLES M. METZNER
U. S. D. J.

APPENDIX III

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 407-September Term, 1975

(Argued December 19, 1975
Decided March 8, 1976.)

Docket No. 75-7333

Jane Monell, Susan Terrall, Beverly Zapata and Carol Abbey, on their own benalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

-against-

Department of Social Services of the City of New York, Jules M. Sugarman, as Commissioner of the Department of Social Services; Board of Education of the City of New York; Harvey B. Scribner, as Chancellor of the City School District of the City of New York, and John V. Lindsay, as Mayor of the City of New York,

Defendants-Appellees.

Before:

Hays, Timbers and Gurfein,
Circuit Judges

Appeal from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, 394 F. Supp. 853, which dismissed plaintiffs' complaint, based on 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., alleging that the rules and regulations of the defendant city agencies which compelled pregnant employees to take unpaid leaves of absence before medical reasons required them to do so were unconstitutional and praying for injunctive and declaratory relief and back pay, to be awarded against the city agencies and the named defendants in their official capacities.

Affirmed.

Oscar Chase and Gregory Abbey, Brooklyn, New York (Nancy Stearns, Center for Constitutional Rights, New York, N.Y., of counsel), for Plaintiffs-Appellants.

L. Kevin Sheridan, New York, N.Y. (W. Bernard Richland. Corporation Counsel of the City of New York of counsel, for Defendants Appellees.

Gurfein, Circuit Judge:

This is an appeal by the plaintiffs from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, dismissing their complaint. 394 F. Supp. 853 (S.D.N.Y. 1975). The plaintiffs are female employees of the New York City Department of Social Services ("Department") and of the New York City Board of Education ("Board") suing on behalf of themselves and other female employees

in city agencies similarly situated. The essence of the complaint is that rules and regulations of the city agencies formerly compelled pregnant employees to take unpaid leaves of absence before medical reasons required them to do so, and that such rules and regulations were unconstitutional.

The defendants Sugarman, former Commissioner of the Department of Social Services, Scribner, former Chancellor of the City School District of the City of New York, and Lindsay, former Mayor, are sued in their official capacities (Amended Complaint P24). Jurisdiction is alleged under the Civil Rights Act, 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343(3), as well as under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

Judge Constance Baker Motley had previously determined that the action could be maintained as a class action. 357 F.Supp. 1051 (S.D.N.Y. 1972).

The plaintiffs sought declaratory and injunctive relief and damages for "the deprivation of their right to be employed, including but not limited to wages lost." No amount of damages was alleged.[1] The defendants moved to dismiss the action, or in the alternative, for an order granting summary judgment. They also moved to vacate the order granting class action status,

1 Since there is no claim alleged under 28 U.S.C. §1331 and no allegation of the jurisdictional amount, we do not consider whether such a claim would lie. Cf. City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan, J., concurring).

or, in the alternative, to compel the plaintiffs to pay for the class action notice if the action were allowed to continue as a class action. The plaintiffs cross-moved for summary judgment. Judge Metzner dismissed the complaint. 394 F.Supp. 853 (S.D.N.Y. 1975).

With respect to the requests for injunctive and declaratory relief, he noted that in the fall of 1971, the Department had changed its maternity leave policy to provide that no woman need report her pregnancy or take maternity leave as long as she is able to continue to perform her job and desires to do so. The policy change became effective on January 29, 1972. The Board of Education similarly changed its bylaws effective September 1, 1973. The judge therefore dismissed as moot

the claims for equitable relief by way of injunction or declaratory judgment. We agree that these claims are moot and accordingly affirm. See Nieves v. Oswald, 498 F.2d 802, 813-15 (2d Cir. 1974); cf. DeFunis v. Odegaard, 416 U.S. 312 (1974).

The District Judge also dismissed the claims for back pay covering the periods for which plaintiffs allege they could have worked after they were forced to take maternity leave on the ground that there was no subject matter jurisdiction for the award of back pay either under Title VII or under §1983. Judge Metzner determined that the 1972 amendment to Title VII, Pub. L. No. 92-261, §2(1) (amending Title VII §701(a), 42 U.S.C. §2000e(a)), which broadened the definition of "person" under the Act so

as to include "governments, governmental agencies [and] political subdivisions," could not be applied retroactively. He therefore dismissed the claim for relief pursuant to Title VII, since all the acts of discrimination claimed to have been committed against the named plaintiffs occurred before the 1972 amendment to Title VII. The court also concluded that any attempt to use §1983 as a basis of obtaining monetary relief against the named city officials in their official capacities would circumvent the decision of the Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961), which held that municipalities cannot be sued for damages under §1983, and accordingly dismissed the claim for relief brought under that section.

Appellants contend that the court erred in dismissing the action for lack of jurisdiction under the Civil Rights Act (§1983) and in failing to give retroactive effect to the amendment of Title VII in 1972.

I

Appellants are correct in their contention that, under the Title VII amendment of 1972, municipalities and their subdivisions are employers within the meaning of the Act. They also correctly state that one of the remedies provided for violation of the Act is the award of back pay. Title VII §706(g), 42 U.S.C. §2000e-5(g). Back pay is specifically made "payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment

practice." Id. (emphasis added). There is no statutory warrant for such an award against a public official, however. Accordingly, so far as the Title VII claim is concerned, employees discriminated against may henceforth obtain an award of back pay against the city itself (but not against individual officials).

We must conclude, however, that the 1972 amendment to Title VII does not apply retroactively so as to permit an award of back pay against the city in this case. The same law, Pub. L. No. 92-261, section 2(1) of which amended the definition of "person" to include "governments, governmental agencies [and] political subdivisions," also struck out in section 3 the exemption for the employment of individuals

engaged in educational activities of nonreligious educational institutions. In Weise v. Syracuse University, 522 F. 2d 397, 410-11 (2d Cir. 1975), we met the question Title VII was applicable to discrimination occurring before the lifting of the exemption for educational institutions. We held that it was not retroactive, for it was "a statute creating new rights where none had previously existed." Judge Smith went on to note that "[t]he manifest injustice of such ex post facto imposition of civil liability is reflected in the general rule of construction that absent clear legislative intent statutes altering substantive rights are not to be applied retroactively. Greene v. United States, 376 U.S. 149, 160, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964); Farmington River

Power Co. v. Federal Power Commission, 455 F.2d 86, 90 (2d Cir. 1972); Herman Schwabe, Inc. v. United Shoe Machinery Corp., 274 F.2d 608, 610 (2d Cir.), cert. denied, 363 U.S. 811, 80 S.Ct. 1247, 4 L.Ed.2d 1153 (1960)." 522 F.2d at 411.

We see no valid ground for distinguishing the sex-discrimination claim in Weise from similar claims against the city or the Board of Education based upon a retroactive application of Title VII. Indeed, the Supreme Court in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 n.8 (1974), expressed the view that the statutory amendments passed after the alleged discriminations in LaFleur had been committed "are, of course, inapplicable to the cases now before us."

In Brown v. General Services Administration, 507 F.2d 1300, 1304-06 (2d Cir. 1974), cert. granted, 421 U.S. 987 (1975), we did hold §717(c) of Title VII, 42 U.S.C. §2000e-16(c), to be retroactive. But this was merely a procedural section relating to federal employees which gave them a limited right to judicial review of Title VII claims before administrative remedies were exhausted. Similar administrative remedies had previously been available to enforce rights provided by Title VII. In the case of city employees, on the other hand, entirely new substantive rights were created by the amendment to Title VII. We are constrained to hold, as a consequence, that back pay may not be awarded against the city or the Board of Education under Title VII for dis-

crimination that occurred before the 1972 amendment. The argument that, as in Brown, there was already a substantive right not to be forced to take a maternity leave arbitrarily is not well-taken. To support their position, appellants cite Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973), and Cleveland Board of Education v. LaFleur, supra. But these cases were not decided until 1973 and 1974, respectively. In any event, no remedy existed prior to 1972 by which appellants could secure monetary relief to compensate them for the alleged discrimination.[2]

2 See Weise v. Syracuse University, supra, 522 F.2d at 411 n. 23, where we noted that an Executive Order had prohibited discrimination by the University prior to 1972, but that plaintiffs could not be considered as having a substantive right to recover damages under that Executive Order since the Order

We are thus compelled to conclude that plaintiffs cannot maintain their action under the provisions of Title VII.

II

Alternatively, plaintiffs argue that their suit can be maintained under 42 U.S.C. §1983, which provides that any "person" who, under color of state law, deprives any citizen of his constitutional rights, "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Although the Supreme Court held in Monroe v. Pape, supra, 365 U.S. at 187-92, and in City of Kenosha v. Bruno, 412 U.S. 507 (1973), that municipalities are not "persons"

2 could be enforced only by the Department of Labor.

within the meaning of §1983, the appellants nevertheless argue that the city officials named in their complaint are "persons" for §1983 purposes, even though they are used in their official capacities for monetary relief. Furthermore, plaintiffs contend that the defendant Board of Education of the City of New York is itself a "person" and can be sued directly in its own right under §1983.

A.

It is common ground that a municipality is not itself a "person" under the Civil Rights Act, Monroe v. Pape, supra, 365 U.S. at 187-92; City of Kenosha v. Bruno, supra, and that a state or county is also not such a "person". See Moor v. County of Alameda, 411 U.S. 693, 699-700, 706 (1973);

Zuckerman v. Appellate Division, 421 F.2d 625, 626 (2d Cir. 1970); United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84, 86, (3d Cir. 1969); Williford v. California, 352 F.2d 474, 476 (9 Cir. 1965). By like token, a department of such government is not a "person", as is conceded by appellants here with respect to the Department of Social Services of the City of New York.

While appellants concede that the Department of Social Services, being a department of the city, is not itself a "person" under §1983, they argue, nevertheless, that the Board of Education is such a "person" and is therefore suable directly for back pay. Appellants argue that the Board of Education is an independent body and not merely an arm

of the city like the Department of Social Services.

When we consider so-called independent agencies of the state or city, we must recognize that not all have the same character, function or degree of independence. We know of no rule of thumb that may be deemed controlling on the question whether independent agencies are to be considered "persons" for the purposes of §1983.

Thus, the State University of New York is not a "person." Blanton v. State University of New York, 489 F.2d 377, 382 (2d Cir. 1973). The New York City Employees' Retirement System has been held not to be a "person." Surowitz v. New York City Employees' Retirement System, 376 F.Supp. 369, 371-72 (S.D.N.Y. 1974) (Pollack, J.). Nor

is the New York City Transit Authority. Sams v. New York State Board of Parole, 352 F.Supp. 296, 298-99 (S.D.N.Y. 1972) (Weinfeld, J.). On the other hand, the State Housing Finance Agency has been said to be a "person" within §1983, though in that case there was also jurisdiction over it under §17(a) of the Securities Act of 1933, 15 U.S.C. §77q (a), sovereign immunity having been waived.[3] Forman v. Community Services,

3 Though the definition of "person" in §3(a)(9) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(9), was more limited, and did not include governmental agencies until the 1975 amendment of §3(a)(9), the Securities Act of 1933 has always included in its definition of "person" "a government or political subdivision thereof." Securities Act of 1933 §2(2), 15 U.S.C. §77b(2). Since the Supreme Court reversed the holding of the Court of Appeals that a share in a cooperative housing project is a "security," it did not have to determine whether

Inc., 500 F.2d 1246, 1255 (2d Cir. 1974), rev'd on other grounds sub nom. United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) (for opinion below, see 366 F.Supp. 1117, 1120 (S.D.N.Y. 1973) (Pierce, J.)). We need not consider whether the State Housing Finance Agency is a "person" under §1983, for that agency is not before us.[4] To the extent that the

3 there was federal jurisdiction under §1983. See 421 U.S. at 846 n.11.

4 The State Housing Finance Agency was described, in the court's discussion of sovereign immunity, as one that "has the express authority to sue and be sued; it acts only as a credit or financing entity; it apparently has no power to take property in its own name or in the name of the State." 500 F.2d at 1256.

language of the Forman opinion may be read to imply that all "agencies" are persons under §1983, 500 F.2d at 1255, we are not bound by the broad nature of the generalization and we doubt that it was so intended.

We think that the Board of Education is no more a "person" than the State University, the City Employees' Retirement System or the City Transit Authority. While the Board of Education has certain independent powers to manage the school system, it performs a vital governmental function in so doing, and, significantly, while it has the right to determine how the funds appropriated to it shall be spent, see Divisich v. Marshall, 281 N.Y. 170, 173-74 (1939), it has no final say in deciding what its appropriations shall be.

All funds for use of the Board of Education must be appropriated by the city. Section 2576(5) of the New York Education Law provides that the Board of Education must prepare an annual estimate of its expenses for the ensuing fiscal year which shall be submitted to the Mayor. The statute further provides that if the amount requested in the estimate is above a certain sum, then the excess amount requested shall "be subject to such consideration and to such action by the Board of Estimate, the Council, and the Mayor as that taken upon departmental estimates submitted by the Mayor." Thus, the funds of the Board of Education are public funds appropriated for its use as if it were a department of the city government.

Furthermore, §2580 of the Education

Law provides that all public moneys appropriated to the use of the Board of Education shall be paid into the treasury of the city. Similarly, §2557 of the Education Law provides that the Board of Education shall take title to all of its real property in the name of the city. Thus, it is clear that the affairs of the New York City Board of Education are intimately connected with the city itself.

Appellants argue, however, that several Supreme Court and Second Circuit cases have held that a Board of Education is a "person" for purposes of §1983. They cite Cleveland Board of Education v. LaFleur, supra; Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), and Green v. Waterford Board of Education, supra. These cases

were actions brought under §1983 against Boards of Education, and were decided on their merits without any jurisdictional problem being perceived.

We do not find these decisions to be binding precedents. In none of the cases was the attention of the court called to the possible lack of subject matter jurisdiction. As the Supreme Court said in In re Nielsen, 131 U.S. 176, 184 (1889), "[i]f we have seemed to hold the contrary in any case, it has been from inadvertence." In point of fact, moreover, in every case individual defendants were named in addition to the Board of Education. In Cleveland Board of Education v. LaFleur, the other defendants designated as "et al." probably were school officials whose presence

conferred sufficient jurisdiction in any event.[5] In Lombard v. Board of Education, the principal of the school who recommended the discharge of Lombard was a named defendant. And in Green v. Waterford Board of Education, the Superintendent of Schools was named as a defendant. There was no discussion

5 The jurisdictional question was apparently so far from the central thought that neither the District Court opinion, LaFleur v. Cleveland Board of Education, 326 F.Supp. 1208 (E.D. Ohio 1971), nor the Court of Appeals opinion, 465 F.2d 1184 (6 Cir. 1972), mentions who the et al. defendants were. The District Court opinion in the companion case of Cohen v. Chesterfield County School Board, 326 F.Supp. 1159 (E.D.Va. 1971), does tell us that the Superintendent of Schools was an individual defendant though the members of the County School Board apparently were not. No question of subject matter jurisdiction appears to have been raised or discussed by the Supreme Court in either case.

of the issue in any of these cases and certainly no reasoned determination of it. Cf. City of Kenosha v. Bruno, supra, 412 U.S. at 512.

We hold that the Board of Education itself is not a "person" within the meaning of §1983 and that this court, accordingly, has no jurisdiction to award any relief against it under the Civil Rights Act.

B.

We must, however, consider appellants' claim that the officials named in their complaint may be sued in their official capacities under §1983 for damages, even though the money would have to come out of the city treasury.

There is no doubt that municipal and state officials, sued in their official capacities, are "persons" within the meaning of §1983 when they are sued

for injunctive or declaratory relief. See Wright v. Chief of Transit Police, slip op. 1561, 1562-63 (2d Cir. Jan. 15, 1976); Gresham v. Chambers, 501 F. 2d 687, 690 (2d Cir. 1974); Erdmann v. Stevens, 458 F.2d 1205, 1207-08 (2d Cir.), cert. denied, 409 U.S. 889 (1972). It is also true that individual officials who violate the civil rights of plaintiffs may be required to respond to damages for their tortious conduct out of their own pockets. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).[6]

6 In Scheuer, the Supreme Court treated the action for money damages as one "to impose individual and personal liability on the named defendants." It was only on this "favorable reading" that the action was held not to be barred by the Eleventh Amendment pursuant to Edelman v. Jordan, 415 U.S. 651 (1974)

In this case, unlike Scheuer, there are no allegations that the individual defendants acted outside the scope of their offices or in an arbitrary manner. The individual defendants are sued here solely in their official capacities.

Appellants would have us merge two discrete conceptions to award relief. They would have us entertain suit against the official who committed an unconstitutional act, without malice, solely ex officio, even though from the nature of the relief sought -- back pay -- an award must come out of the public treasury of the Board of Education.

Recognizing that the Eleventh Amendment, which bars suits against states in the federal courts, has no direct application to cities, see Edelman v. Jordan,

415 U.S. 651, 657, n. 12 (1974), we nevertheless find a compelling analogy from cases arising under the Amendment.

In the landmark case of Ex parte Young, 209 U.S. 123 (1908), the Supreme Court held that a state official threatening to enforce an unconstitutional state statute could be sued for injunctive relief despite his contention that he was merely a representative of the state and that, accordingly, a suit against him would be a suit against the state, which is barred by the Eleventh Amendment. The fiction upon which the Young decision is supported is that a suit against a state officer to restrain him from taking action in his official capacity is a suit against the individual officer and not against the state.

An action for money damages, as

distinct from a suit for injunctive relief, can hardly be said "not [to] affect the State in its sovereign or governmental capacity," 209 U.S. at 159, if the state is required to pay the judgment. And, in such case, the bar of the Eleventh Amendment applies, even though the named defendant is the official rather than the state. See Edelman v. Jordan, supra, 415 U.S. at 663; Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573, 577 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462-64 (1945). See also Fitzpatrick v. Bitzer, 519 F.2d 559, 563-64 (2d Cir. 1975), cert. granted, 44 U.S.L.W. 3358 (U.S. Dec. 16, 1975) (No. 75-251); Wilkerson v. Meskill, 501 F.2d 297 (2d Cir. 1974). As the Court recently noted, "the doctrine

of Ex parte Young is of no aid to a plaintiff seeking damages from the public treasury." Scheuer v. Rhodes, supra, 416 U.S. at 238. The Court has established the principle, moreover, that in Eleventh Amendment cases "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding," and that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, supra, 323 U.S. at 464.

There is no logical way to avoid a similar result when the damages which

are sought in a §1983 action will have to be paid by a city that was held not to be amenable to such an action in Monroe v. Pape, supra. As the legislative history recited by Mr. Justice Douglas demonstrates, municipalities were simply not to be subjected to damage suits under the Civil Rights Act. The fiction that permits equity relief under Ex parte Young loses its validity, as we have seen in the Eleventh Amendment cases, when the public body which is not amenable to suit is requested to pay the judgment. Just as the Congress which enacted the Eleventh Amendment in order to overrule Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), meant to protect the treasury of the states, so the Reconstruction Congress which enacted the Civil Rights Act sought to protect municipal treasuries. The mere

substitution of the name of the official for the name of the city in the complaint cannot be used as a subterfuge to circumvent the intent of Congress. Thus, we must consider the suit at hand to have been brought directly against the City and the Board of Education, which as we have seen, are not "persons" for purposes of §1983. We are therefore without jurisdiction to hear this suit.[7]

7 Our decision accords with the results reached by the numerous district courts that have considered the question. See Westberry v. Fisher, 309 F.Supp. 12, 18 (D. Me. 1970) (Gignoux, J.); Bennett v. Gravelle, 323 F.Supp. 203, 210-11 (D. Md.), aff'd, 451 F.2d 1011 (4 Cir. 1971), petition for cert. dismissed, 407 U.S. 917 (1972); Conway v. Alfred I. DuPont School District, 333 F.Supp. 1217, 1218-19 (D. Del. 1971), quoting Mathias v. New Castle County Vocational Technical School District, No. 4073 (D. Del. Sept. 22, 1971) (Stapleton, J.); Francis v. Davidson, 340 F.Supp. 351, 370 (D. Md.) (three-judge court) (Frank A. Kaufman, J.), aff'd mem., 409 U.S. 904 (1972); Hayes v. Cape Henlopen School District, 341 F.Supp. 823, 829 (D. Del. 1972); O'Brien v. Galloway, 362 F. Supp. 901, 905 (D. Del. 1973); Hahn v. Ingram, 362 F.Supp. 982, 985, (D. Del. 1973); Veres v. County of Monroe, 364 F.Supp. 1327, 1331 (E. D. Mich. 1973); Rochester v. Baganz, 365 F.Supp. 179, 183 (D. Del. 1973); Klein v. New Castle County, 370 F. Supp. 85, 91-92 (D. Del. 1974); Hines v. D'Artois, 383 F.Supp. 184, 189-90 (W.D. La. 1974); Needleman v. Bohlen, 386 F.Supp. 741, 745-46 (D. Mass. 1974); and Patton v. Conrad Area School District, 388 F. Supp. 410, 417 (D. Del. 1975).

(Footnote 7 continued)

To the extent that the court in Conway v. Alfred I. DuPont School District, supra, and in the later case of Boyce v. Alexis I. duPont School District, 341 F.Supp. 672, 674-75 (D.Del. 1972), indicated that damages could be recovered against individual defendants in their official capacities if it were established that the officials acted in bad faith, we believe that it erred and that it misinterpreted Judge Stapleton's opinion in the Mathias case. A finding of bad faith could result in a judgment against the officials in their individual capacities, but not in their official capacities.

In answer to all this, appellants contend that despite the logical implications of Monroe v. Pape, such grants of back pay have actually been upheld. They point out that in Cohen v. Chesterfield County School Board, the companion case to Cleveland Board of Education v. LaFleur, supra, in which the Supreme Court held mandatory pregnancy leave rules to be unconstitutional, the District Judge whose decision was ultimately affirmed had actually awarded back pay. 326 F.Supp. 1159, 1161 (E.D. Va. 1971). They rely on the statement of Mr. Justice Stewart that "[t]he District Court held that the School Board regulation violates the Equal Protection Clause, and granted appropriate relief." 414 U.S. at 638. They seize upon the word "appro-

priate" as a reasoned view of the Supreme Court that back pay, the relief awarded below, is "appropriate." We do not agree. The sentence quoted was merely part of the statment of facts in Mr. Justice Stewart's opinion. Certiorari was granted only "to resolve the conflict between the Courts of Appeals regarding the constitutionality of such mandatory maternity leave rules for public school teachers," id., and the discussion in the opinion nowhere adverts to the award of back pay. [8]

8 Appellants further rely on the case of Sugarman v. Dougall, 413 U.S. 634 (1973). They argue that the plaintiffs in Sugarman sued under §1983 for both injunctive relief and lost wages, and that neither the three-judge district court, Dougall v. Sugarman, 339 F.Supp. 906 (S.D.N.Y. 1971), nor the Supreme Court questioned the propriety under §1983 of the claim for damages.

(Footnote 8 continued)

While it is true that the amended complaint in Sugarman prayed that that the court "[g]rant each plaintiff damages of $10,000 as represented by lost earnings," this claim was apparently not pressed at trial. The District Court granted only injunctive and declaratory relief, and the Supreme Court was thus not faced with the issue of whether monetary relief against the named officials was permissible under §1983.

Another case relied on by plaintiffs is Calo v. Paine, 521 F.2d 411, 413 (2d Cir. 1975). In Calo we held that an action under §1983 could be brought against municipal officials who, as appears from the caption of the case in the district court, were sued both in their individual and their official capacities. Furthermore, as we noted, 521 F.2d at 412, the complaint asked both for equitable relief and for back pay and compensatory and punitive damages. We do not, however, interpret Calo as holding that city officials are considered "persons" for §1983 purposes even when they are being sued in their official capacities for damages, as we merely vacated Judge Blumenfeld's grant of summary judgment for the defendant and remanded the case for further proceedings. Since Judge Blumenfeld had not awarded any damages, we

(Footnote 8 continued)

were not required to consider whether a federal court has jurisdiction, in a proper case, to award such damages against city officials sued in their official capacities.

Similarly distinguishable is the case of Sterzing v. Fort Bend Independent School District, 496 F.2d 92 (5 Cir. 1974). The Sterzing court dealt on appeal only with the claim of the plaintiff that he was entitled to the equitable remedy of reinstatement. In remanding, the court stated that it expressed no view on what the remedy should be.

The other cases cited by plaintiffs in their brief are plainly distinguishable. In most of these cases either the defendants were sued in their individual, not their official, capacities, e.g., Ingraham v. Wright, 498 F.2d 248, 251-52 (5 Cir. 1974), or only injunctive relief was requested, e.g., Rochester v. White, 503 F.2d 263, 266-67 (3 Cir. 1974).

Plaintiffs also place reliance on Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6 Cir. 1974), which held that persons who were successful in obtaining an injunction against a county sherrif in his official capacity could be awarded attorneys' fees, to be assessed against the sheriff in his official capacity and paid out of public funds. That is not the same as awarding damages.[9]

9 See Thonen v. Jenkins, 517 F.2d 3, 7-8 (4 Cir. 1975), which noted that attorneys' fees are like costs of the action. Our analogous holding in Fitzpatrick v. Bitzer, supra, 519 F.2d at 571-72, may be reviewed by the Supreme Court, since a writ of certiorari has been granted. 44 U.S.L.W. 3358 (U.S. Dec. 16, 1975) (No. 75-251).

We note, in passing, that

We find ourselves in disagreement with the recent decision of a panel of the Fifth Circuit in Muzquiz v. City of San Antonio, 520 F.2d 993, 998-1001 (5 Cir. 1975), which held that individual members of the Firemen's and Policemen's Pension Fund of the City of San Antonio could be sued in their orficial capacities for monetary relief, despite the fact that any damages awarded would be paid out of the Pension Fund. We agree with the well-reasoned dissent

9 in Alyeska Pipeline Service, Inc. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court rejected the "private attorney general" rationale used to justify the award of attorneys' fees in Fair.

of Judge Godbold, 520 F.2d at 1007-10, that such a result would clearly contravene the jurisdictional bar to suits against muncipalities which the Congress that enacted the Civil Rights Act intended to establish.[10]

III

We think the result we have reached is sound both as a matter of policy and as a matter of logic. Yet, to a certain extent this conclusion may seem an anomaly. The Congress which enacted the 1972 amendment to Title VII appears not to have hesitated to impose direct

10 The Fifth Circuit has decided to have Muzquiz reheard en banc, along with its companion case of Warner v. Board of Trustees, 524 F.2d 1233 (5 Cir. 1975).

liability for damages against municipalities as employers for violation of the law against employment discrimination. But it did not see fit to make Title VII retroactive.

In the future, employees aggrieved by acts arising as a result of employment discrimination by a city will have direct redress from the city for back pay through the mechanism of Title VII without any need to rely on the Civil Rights Act.

On the other hand, if we try to adjust the grievances of the present plaintiffs by allowing the remedy of back pay under §1983 alone, we would be broadening the indirect remedy of damages generally against cities, which we are reluctant to do for reasons of precedent and concomitant

policy.

There is no claim for reinstatement here. The claim for back pay is not merely an adjunct of equitable relief. It stands simply as a claim for damages which cannot be distinguished from many other claims for violation of civil rights in actions which do not involve employment discrimination.

We accordingly affirm the decision of the District Court.